BOND FOR WRIT OF ATTACHMENT AND SEQUESTRATION

STATE OF LOUISIANA
FIRST CITY COURT OF NEW ORLEANS

No. 148-848

W. T. GRANT COMPANY

vs.

LAWRENCE MITCHELL

KNOW ALL MEN BY THESE PRESENT, That we Jerry Dunnegan of W. T. Grant Company as principal and Anthony J. Russo as surety of the City of New Orleans and State of Louisiana, are held and firmly bound unto Clerk of Court, First City Court for the City of New Orleans his successors in said office in the sum of $1,125.00 Dollars money of the United States of America for which payment, well and truly to be made to the said Clerk of Court, First City Court for the City of New Orleans or his successors, we bind ourselves, in solido, and each of our executors, administrators, heirs and assigns, firmly by these presents.

Signed and dated the 2nd day of Feb., 1972.

WHEREAS, the said W. T. Grant Company has this day obtained an order from the First City Court for the City of New Orleans, ordering a writ of Sequestration to issue herein in the suit entitled W. T. Grant Company vs. Lawrence Mitchell, No. ———.

Now, the condition of the above obligation is that we, the above bound principal and surety, will well and truly pay to said parties aforesaid, for the benefit of any and all persons interested in said suit, all such damages as

may be recovered against us, in case it should be decided that the said writ was wrongfully obtained.

W. T. Grant Company

By /s/ Jerry Dunnegan
JERRY DUNNEGAN

/s/ Anthony J. Russo
ANTHONY J. RUSSO

AFFIDAVIT OF SURETY

Anthony J. Russo being duly sworn, says that he is worth over and above all his debts and obligations the sum of $1,125.00 Dollars in assets that can be subjected to levy under execution, and that he resides in the Parish of Orleans.

/s/ Anthony J. Russo
ANTHONY J. RUSSO

Sworn to and subscribed before me this 2 day of Feb., 1972 A.D.

/s/ J. Paul Demares

AFFIDAVIT OF PRINCIPAL

Jerry Dunnegan being duly sworn, says that he is informed and believes that Anthony J. Russo the surety on this bond, is worth over and above his debts and obligations in assets that can be subjected to levy under execution, the amount for which he has bound himself in this bond.

W. T. Grant Company

By /s/ Jerry Dunnegan
JERRY DUNNEGAN

Sworn to and subscribed before me this 2 day of Feb., 1972 A.D.

/s/ J. Paul Demares

Filed ....., 1972, ...
Deputy Clerk.

Favret and Favret, Attorneys
WRIT OF SEQUESTRATION

STATE OF LOUISIANA

First City Court of the City of New Orleans

To The Constable of the First City Court of the City of New Orleans

Greeting:

YOU ARE HEREBY COMMANDED TO SEQUESTER in the name of the State of Louisiana and of the First City Court of the City of New Orleans.

Suit No. FC 148-848
Section ——— Docket No. 3

W. T. GRANT COMPANY

versus

LAWRENCE MITCHELL

WHEREAS, W. T. Grant Company hath this day declared on OATH that Lawrence Mitchell who resides in this city, 7611 Chef Menteur Highway, Apt. A-10 is truly and justly indebted to W. T. Grant Company petitioner herein, in the full sum of Five Hundred Seventy Four and 17/100 $574 Dollars 17/100 cents with interest from judicial demand until paid, plus (—%) attorney's fees, and for all costs. And that the Constable of the First City Court of the City of New Orleans, seize the following property to-wit:

ONE BRADFORD REFRIGERATOR

ONE BRADFORD RANGE

ONE USED STEREO

ONE BRADFORD WASHER

AND that he has good cause to fear and does fear that the said above articles will be removed from the jurisdiction of this Court during the pendency of this suit.

YOU ARE, THEREFORE, COMMANDED TO SEQUESTER THE ARTICLES AS ABOVE DESCRIBED and to take the same into your possession until further order of this Court.

WITNESS MY HAND, this 2nd day of February 1972

/s/ L. Francis, Deputy Clerk.

Favret and Favret, Attys.

CITATION

FIRST CITY COURT OF THE CITY OF
NEW ORLEANS
STATE OF LOUISIANA

No. FC 148-848 Section Docket 3

W. T. GRANT COMPANY

vs.

LAWRENCE MITCHELL

TO: LAWRENCE MITCHELL
7611 CHEF MENTEUR HIGHWAY
APARTMENT A-10

YOU ARE HEREBY CITED to comply with the demand contained in the petition of which a certified copy accompanies this citation, either by filing a pleading or make an appearance in The First City Court of The City of New Orleans, State of Louisiana, the address of which is The Civil Courts Building, 421 Loyola Avenue, New Orleans, Louisiana, within five days (exclusive of legal holidays) after the service hereof under penalty of default.

WRIT OF SEQUESTRATION FILED HEREIN.
AFFIDAVIT, ORDER AND BOND FILED.

Witness the Honorables ARTHUR J. O'KEEFE, JR., DOMINIC C. GRIESHABER, MARION G. SEEBER, Judges of the said Court.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of The First City Court of The

City of New Orleans, State of Louisiana, this 2nd day of Feb. in the year of our Lord 1972:

NAT GROS, Clerk of The
First City Court of the
City of New Orleans, State of Louisiana

by /s/ L. Francis
Deputy Clerk

Clerk's Office, Room 201, Civil Courts Building
421 Loyola Avenue, New Orleans, Louisiana

FIRST CITY COURT FOR THE CITY OF
NEW ORLEANS
STATE OF LOUISIANA

No. 148-848 Section "A" Docket No. 3

W. T. GRANTS

vs.

LAWRENCE MITCHELL

Filed: 3-3-72 /s/ JZ Deputy Clerk

MOTION TO DISSOLVE
WRIT OF SEQUESTRATION

Now into court through undersigned counsel comes Lawrence Mitchell and moves that the Writ of Sequestration issued herein on February 2, 1972, be dissolved for the following reasons:

1. The writ of sequestration issued herein concerns property of defendant which is exempt from seizure by any process whatsoever under LSA-R.S. 13:3881; specifically exempt is the refrigerator, stove, and electric wash tub.

2. On February 7, 1972, defendant's stove, refrigerator, and electric wash tub were seized pursuant to said writ of sequestration.

3. Defendant received no notice prior to the seizure nor was he afforded an opportunity to defend his right to the personal property prior to the seizure in violation of the Due Process Clauses of the Louisiana and United States Constitutions.

4. The stove, refrigerator, and electric wash tub seized deprived defendant, his wife, and their three children of basic necessities required for safe, sanitary, and decent living in the city of New Orleans. Because of defendant's low income, he and his family have not been able to acquire substitutes for these items seized.

5. Defendant reserves his right to damages for wrongful seizure in his reconventional demand.

6. Defendant further says that he is a citizen of this State and is presently domiciled in the Parish of Orleans, and that because of his poverty and want of means he is unable to make prior payment or costs of these proceedings as they accrue, or to furnish security therefore and that he desires to prosecute these proceedings in accordance with the provisions of LSA-CCP 5181

WHEREFORE defendant prays that plaintiff W.T. Grant show cause why the writ of sequestration issued herein should not be dissolved and further that he be allowed to prosecute this action in forma pauperis.

/s/ Robert J. Hobbs
ROBERT J. HOBBS
Attorney for Petitioner
2643 Desire Street
New Orleans, Louisiana 70117
Phone: 944-7401

ORDER

IT IS ORDERED that the plaintiff herein show cause on the 14th day of March, 1972, why the Writ of Sequestration issued in the above captioned matter should not be resolved.

New Orleans, Louisiana
this 3rd day of March, 1972

/s/ [Illegible]
Judge

CERTIFICATE

I do hereby certify that a copy of the foregoing has been served upon opposing counsel this 3 day of March, 1972 via U.S. Mail, postage prepaid.

ROBERT J. HOBBS

Issued 3-3-72
/s/ VMA

Please Serve:

Marshall J. Favret
527 Hibernia Bank Bldg.
New Orleans, La. 70112

FIRST CITY COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

Section "A"

No. 148-848

W. T. GRANT COMPANY

vs.

LAWRENCE MITCHELL

APPEARANCES:

FAVRET & FAVRET

By Marshall Favret, Esq., for the plaintiff

ROBERT J. HOBBS, For the defendant

Stipulation heard before the Honorable Arthur J. O'Keefe, Jr., Judge presiding over Section "A" of the First City Court for the Parish of Orleans, State of Louisiana on March 14, 1972.

BY MR. FAVRET:

It is stipulated that the vendors lien did exist on the items.

I, William B. Kitchen, Jr., an Official Court Reporter, do hereby certify that the preceding transcript is a true and correct copy of the stipulation given in the preceding matter on the 14th day of March, 1972.

/s/ William B. Kitchen, Jr.
WILLIAM B. KITCHEN, JR.
Official Court Reporter

FIRST CITY COURT FOR THE
CITY OF NEW ORLEANS
STATE OF LOUISIANA

SECTION "A"

No. 148-848 Docket 3

W. T. GRANT COMPANY

vs.

LAWRENCE MITCHELL

JUDGMENT

This matter came for trial on March 14, 1972, on a Motion filed by defendant, Lawrence Mitchell, to dissolve the Writ of Sequestration previously issued herein.

PRESENT: MARSHALL J. FAVRET, Counsel for Plaintiff
ROBERT J. HOBBS, Counsel for Defendant.

When, after examining the pleadings, considering the joint stipulation of counsel, and the oral argument, for the reasons orally assigned;

IT IS ORDERED, ADJUDGED AND DECREED, that there be judgment herein in favor of plaintiff, W. T. GRANT COMPANY, and against defendant, LAWRENCE MITCHELL, dismissing defendant's Rule to Dissolve the Writ of Sequestration previously issued herein.

THIS DONE AND SIGNED on this 16 day of March, 1972, at New Orleans, Louisiana.

/s/ Arthur J. O'Keefe, Jr.
Judge

FIRST CITY COURT FOR THE
CITY OF NEW ORLEANS
STATE OF LOUISIANA

SECTION "A"

No. FC 148-848 Docket 3

W. T. GRANT COMPANY

vs.

LAWRENCE MITCHELL

REASONS FOR JUDGMENT

Defendant filed before this Court a motion to dissolve a Writ of Sequestration and to proceed in Forma Pauperis. On separate hearing of these matters, both motions were denied.

Regarding the question of the right to proceed in Forma Pauperis, the Court is of the opinion that defendant is of sufficient means to prosecute a claim of this nature. Considering the amount of court costs involved, the Court does not feel that an undue or unreasonable burden is placed upon defendant by the denial of his motion. Admittedly, defendant is experiencing severe financial difficulties, however, the Court does not envision that the provisions of LSA-CCP 5191 encompass a poverty situation such as was presented by defendant in these proceedings.

On his motion to dissolve the Writ of Sequestration, defendant set forth as grounds for same two separate issues:

1) That the Writ of Sequestration was executed against property which is specifically exempt from such process under the provisions of LSA-R.S. 13: 3881.

2) That the provisional seizure denied defendant due process under law as provided by the Louisiana and United States Constitutions.

On the first question, the Court is of the opinion that the items seized are not exempt from seizure in instances involving a Vendor's Lien and Privilege. The Court is of the opinion that the Vendor's Lien and Privilege is a basic and essential right afforded a creditor under our law of Obligations. The right to provisional seizure is likewise a basic adjunct and necessary remedy to maintain and enforce the creditor's lien and privilege.

The Court is of the opinion that the provisional seizure enforced through sequestration was not a denial of due process and, in this instance, did not impinge upon defendant's constitutional rights. To the contrary, plaintiff insured defendant's right to due process by proceeding in accordance with Louisiana Law as opposed to any type of self-help seizure which would have denied defendant possession of his property without due process.

For the above reasons, the motion filed herein was denied.

/s/ Arthur J. O'Keefe, Jr.
Judge

APPLICATION FOR WRITS

COURT OF APPEALS, FOURTH CIRCUIT
STATE OF LOUISIANA

No. 5225

March 21, 1972
/s/ J. M. Wever, Clerk.

W. T. GRANT COMPANY

versus

LAWRENCE MITCHELL

In Re LAWRENCE MITCHELL

APPLYING FOR WRITS OF PROHIBITION, CERTIORARI, MANDAMUS AND REVIEW, DIRECTED TO THE HONORABLE ARTHUR J. O'KEEFE, JUDGE, FIRST CITY COURT OF THE CITY OF NEW ORLEANS, NO. 148-848

Robert J. Hobbs, 2643 Desire Street, New Orleans, La., 70117, 944-7401, Attorneys for Relator.

Marshall Favret, Room 527, Hibernia Bank Bldg., New Orleans, La., 70112, 522-9721, Attorneys for Respondents.

March 28, 1972—WRIT REFUSED

On the showing made by relator and respondent we find no abuse of discretion or other error in the rulings complained of. In connection with the ruling on the Forma Pauperis question see C.C.P. 5182, especially regarding the relatively small amount of court costs (approximately $11.00) which now otherwise would have to be paid. The application is denied.

/s/ P.E.C.
Judge Paul E. Chasez

/s/ L. J. S.
Judge L. Julian Samuel

3/28/72

I am of the opinion that the writ should be granted on the question of the refusal of the trial judge to permit relator to proceed in forma pauperis. See LSA-R.C. 13:3881.

/s/ [Illegible]

A TRUE COPY

New Orleans, Mar. 28, 1972

/s/ J. M. Wever, Clerk
Court of Appeals,
Fourth Circuit

SUPREME COURT OF LOUISIANA

No. 52,388

W. T. GRANT COMPANY

vs.

LAWRENCE MITCHELL

On Writ of Review to the Court of Appeal,
Fourth Circuit, Parish of Orleans

SUMMERS, Justice.

Lawrence Mitchell purchased a refrigerator, range, stereo and washer from W. T. Grant Company (Grant) on an installment sales contract. When he defaulted in his payments, Grant instituted this suit in the First City Court of New Orleans for $574.19, the balance due on the contract.

Grant alleged its entitlement to "a vendor's lien and privilege" on the merchandise and that it "fears that said defendant will encumber or alienate same during the pendency of the proceeding. . . ." Accordingly, Grant alleged, the issuance of a writ of sequestration was necessary to protect its interest. La. Code Civ. P. art. 3501, 3571.

In an attached affidavit Jerry Dunnegan, Grant's Credit Manager, verified the facts of the petition and affirmed that petitioner "has reason to fear and believe that the said defendant, Lawrence Mitchell, will encumber, alienate or otherwise dispose of the merchandise . . . during the pendency of these proceedings, and that a writ of sequestration is necessary. . . ." La. Code Civ. P. art. 3501.

Dixon, J. concurs in the result, but is of the opinion that Young v. Geter, 185 La. 709, 170 So. 240, is *contra* and should be overruled. Young v. Geter gives too narrow a construction to Article 1, Section 11 of the Louisiana Constitution.

BARHAM, J., dissents for reasons assigned by TATE, J.

TATE, J., dissents and assigns written reasons.

The Judge of the City Court signed an order for the issuance of a writ of sequestration upon plaintiff furnishing bond in the amount of $1,125. La. Code Civ. P. art. 3574. On the same day bond was furnished, February 2, 1972, the writ of sequestration issued, and Mitchell was cited to answer within five days. On February 7, 1972 Mitchell's stove, refrigerator and electric wash tub were provisionally seized pursuant to the writ of sequestration.

Thereafter, on March 3, 1972, Mitchell's counsel filed a motion to dissolve the writ of sequestration, alleging that the refrigerator, stove and electric wash tub were exempt from seizure by any process whatsoever under Section 3881 of Title 13 of the Revised Statutes. The motion to dissolve was also based upon the assertion that Mitchell was denied due process of law in that he received no notice prior to the provisional seizure under the writ of sequestration nor was he afforded an opportunity to defend his rights to the personal property prior to the seizure. Mitchell also alleged his poverty and want of means and sought to proceed in forma pauperis as authorized by Article 5181 of the Code of Civil Procedure.

Mitchell's motion to dissolve and the application to proceed in forma pauperis were denied by the judge a quo, and a subsequent application for review to the Court of Appeal, Fourth Circuit was also denied. We granted review on Mitchell's application.

I.

Section 3881 of Title 13 of the Revised Statutes exempts from seizure the stove, wash tub and refrigerator "under any writ, mandate, or process whatsoever".[1] This

[1] La. R.S. 13:3881:

"The following income or property of a debtor is exempt from seizure under any writ, mandate, or process whatsoever:

* * * *

"(4) The clothing, bed, bedding, bedstead, linen, china, glasses, knives, forks, spoons, dining table and chairs, cooking stove, kitchen

section was added to the revised Statutes by Act 32 of 1960 to replace Article 644 of the Code of Practice [2] when the latter was repealed, having been superseded by the Code of Civil Procedure. See Act 15 of 1960.

After its inclusion in the Revised Statutes, Section 3881 was amended in 1961 to remove all doubt that the wages, salaries, and other compensation of public employees and contractors were subject to garnishment. The second reason was to effectuate the recommendation of the Louisiana Sheriff's Association that the refrigerator used in a debtor's household be exempted from seizure. Act 25 of 1961; Comments by Henry G. McMahon to Section 3881. In all other respects the subject matter of Article 644 of the Code of Practice was unchanged by Section 3881.

This conclusion is further confirmed by the inclusion of Section 3881 in Chapter 18 of Title 13 of the Revised Statutes dealing with seizures in general. This chapter also contains enactments pertaining to execution of judgments under a writ of fiera facias; whereas a separate chapter (Chapter 20) in the same title collects the sec-

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utensils, pressing irons, washtubs, and refrigerator (electric or otherwise) used by him or a member of his family; the family portraits; his arms and military accoutrements; the musical instruments played or practiced on by him or a member of his family; and the poultry and fowl kept by him for the use of his family."

* * * *

[2] La. Code of Practice, art. 644:

"The sheriff or constable can not seize the linen and clothes belonging to the debtor or his wife, nor his bed, bedding or bedstead, nor those of his family, nor his arms and military accoutrements, nor the tools and instruments and books and sewing machines, necessary for the exercise of his or her calling, trade or profession by which he or she makes a living; nor shall he, in any case, seize the rights of personal servitude, of use and habitation, of usufruct to the estate of a minor child, nor the income of dotal property, nor the cooking stove, and utensile of said stove, nor the plates, dishes, knives and forks, and spoons, nor the dining table and dining chairs, nor washtub, nor smoothing irons and ironing furnaces, nor family portraits belonging to the debtor, nor the musical instruments played on or practiced on by any member of the family, nor any poultry or fowls beloning to the debtor for family use."

tions pertaining to provisional remedies (attachment, sequestration, etc.). If the compilers of the Revised Statutes, and the Legislature, intended that the exemptions of Section 3881 should apply to provisional remedies, it would have been more orderly and logical to include this section with the sections on that subject. Instead this exemption provision was included with those sections pertaining to seizures under fiera facias.

Article 644 of the Code of Practice was contained in Chapter 6, "Of The Proceedings in Execution of Judgments." Section 3 of that chapter dealt with "The Execution of Judgments Directing the Payment of a Sum of Money." Paragraph 1 of Section 3 pertained to the Writ of Fiera Facias. Article 644 falls under this heading. It is for this reason that the courts have held that Article Article 644 related to exemptions from seizure under the writ of *fieri facias* only, refusing to allow the exemption against a provisional seizure to assert a lessor's privilege. Ross v. Rosenthal, 1 Orl. App. 203 (1904), cert. denied by Supreme Court June 30, 1904; Benton v. Jarrett, No. 2136 on the Docket of the Court of Appeal, Parish of Orleans, *cert. denied.* In Stewart v. Lacoume, 30 La. Ann. 157 (1878), commenting upon the effect of Article 644, this court said: "It is evident that the exemptions of property from seizure provided for by Art. 644 C.P. and by the Acts of 1872 and 1874, do not apply in favor of the lessees as against their lessors."

These results were based upon the proposition that the lessor's privilege established by Article 2705 of the Civil Code was not on the same subject matter as the exemptions of Article 644 "and the Code of Practice was framed exclusively with a view to judicial proceedings, and its provisions on the subject of general laws do not necessarily repeal those of the Civil Code that are contrary to, or inconsistent with them." Ellis v. Prevost, 13 La. 230 (1839). See also Kay v. Furlow, 178 La. 635, 152 So. 315 (1934); Kyle v. Sigur, 121 La. 888, 46 So. 910 (1908); Ross v. Rosenthal, 1 Orl. App. 203 (1904). In essence, the conclusion has been that exemptions from seizure under fiera facias were inapplicable to provisional remedies to assert privileges created by the Civil Code.

On this basis we hold that the exemptions allowed by Section 3881 cannot be allowed against a provisional seizure by writ of sequestration to preserve a vendor's privilege.

II.

Article 3217 of the Civil Code anounces that "The debts which are privileged on certain movables, are the following: . . . The price due on movable effects, if they are yet in the possession of the purchases. . . ."

Article 3227 elaborates:

> He who has sold to another any movable property, which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale is made on a credit or without, if the property still remains in the possession of the purchaser. . . .

The vendor's privilege on movables exist against the property sold as a substantive right incident to the contract of sale. Johnson v. Bloodworth, 12 La. Ann. 699 (1857); State ex rel Landry v. Broussard, 177 So. 403 (La. App. 1937).

The privilege has been an integral part of the law of Louisiana since the adoption of the State's first code in 1808.[3] Its practical importance has diminished somewhat since adoption of the Chattel Mortgage Act, the latter having been enacted principally to supply the commercial deficiency of the vendor's privilege, which in general does not follow the movable when it leaves the vendee's possession. Nevertheless, the vendor's privilege remains an important and valuable right in commerce. The formality, time and expense involved in executing and recording chattel mortgages often prevent their use, particularly on small, inexpensive chattels or where the vendor neglects or is prevented from using the chattel mortgage. Daggett, *Louisiana Privileges and Chattel*

[3] La. Code of 1808, (Digest of Civil Laws Now in Force in the Territory of Orleans with Alterations and Amendments Adopted to its Present System of Government.) Bk. 3, Tit. 19, Arts. 74, subdiv. 5, and 75, subdiv. 1.

Mortgages, p. 91 (1942); Margolin, *Vendor's Privilege*, 4 Tul. L. Rev. 237 (1929).

As understood in our law, the vendor's privilege does not exist at common law. It is distinguished from the common law vendor's lien, which the vendor loses when he delivers possession of the article sold to the vendee. Daggett, id.

The privilege exists upon the sound equitable principle that when the purchaser acquires the vendor's property, his estate is enriched. "It would indeed be unjust to place an unpaid vendor on a footing of equality with other creditors of the purchaser . . . It would be iniquitous to permit the property sold to become the prey of the creditors of the purchaser without requiring, as a condition precedent, the payment of its cost. . . ." De L'Isle v. Succ. of Moss, 34 La. Ann. 164 (1882).

As defined by Laurent, Vol. XXX, p. 6, § 2; p. 18, § 16, the *raison d'etre* of the vendor's privilege is the enrichment of the purchaser's estate by the acquisition of the vendor's property. The right to the payment of the price has, therefore, always commended itself to the favorable consideration of courts.

Planiol gives this justification of the privilege:

> As long as the price is not paid the sale augments the patrimony of the buyer at the expense of the vendor; the latter has impoverished himself, he has alienated his property and has not received anything in exchange. The vendor has thus gratuitously augmented the common pledge of the creditors of the buyer; the latter can be paid with the property sold without the vendor being paid, they enrich themselves at his expense, which is unjust . . . . (Planiol, Vol. 2, No. 2608)

The privilege alone as defined by the Civil Code is of limited value. It is essentially a right without a remedy for its implementation. The machinery for its enforcement and protection is found in our procedural law. Louisiana has long recognized a need for several types of seizure before judgment. Today two are allowed: attachment and sequestration. Attachment is based upon

some act, or anticipated act, of the debtor which would place the creditor at a disadvantage in the suit and which prompts the law to protect the creditor by permitting him to seize the debtor's property pending the suit, even though the creditor has no claim against the thing seized. Sequestration involves no intent on the part of the debtor to defraud, but it is founded upon a claim to the ownership or possession or a privilege on the property seized. La. Code Civ. P. Book VII, Special Proceedings, Title I, Provisional Remedies, Chapter 1, Attachment and sequestration, Preliminary Statement.

Sequestration issues only when the grounds clearly appear by affidavit, and security is required for the payment of damages for wrongful issuance of the writ. La. Code Civ. P. 3501. It issues on the claim of ownership, right of possession or a mortgage, lien or privilege of it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish during the pendency of the action. Id. art. 3571. In certain instances the court may in its own motion order the sequestration of property where the ownership is in dispute. Id. art. 3572. The seizure must not be excessive, id art. 3505, and the defendant may by contradictory motion obtain its dissolution unless plaintiff proves the grounds. Or defendant may obtain the release of the property upon furnishing security. Id. art. 3507. Sequestration has only the effect of preserving the property pending judgment. Id. 3510. Plaintiff's security is not released until a final judgment is rendered in his favor. Id. art. 3512.

Against this background we consider Mitchell's due process contention. It is based upon the argument that to satisfy the requirements of due process defendant is entitled to prior notice and prior hearing before seizure. The contention is principally based upon the recent decision of the United States Supreme Court in Fuentes v. Shevin, —— U.S. ——, 92 S. Ct. 1983, 1972, and its companion case. There appellants were purchasers of household goods under conditional sales contracts. They challenged the prejudgment replevin provisions of the Florida and Pennsylvania law.

The Court declared these statutes worked a deprivation of property without due process of law insofar as they denied the right to a prior opportunity to be heard before chattels are taken from their possessor. However, in its reasons the Court said, "There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods."

This clearly announced exception to the ruling, we feel, exists in the instant case. Aside from the quoted allegations of the petition and averments of attached affidavits, there is the irrefutable inference that the vendee has, by the act of buying itself, consented to the preservation of the vendor's privilege.

A purchaser can only be excused from the effects of the vendor's privilege by saying he was ignorant of its implications. To sanction such an excuse violates the most fundamental of all legal principles and negates law at its source. It is only one step from the conclusion that the purchaser is presumed to know the law to say that when the purchaser acquires property subject to the vendor's privilege, he is held to be cognizant of the remedies such a privilege affords to the vendor and the ancillary obligations of the purchaser. One of these remedies is the right to sequestration where the purchaser has defaulted in his payments.

Under Louisiana law, therefore, the purchaser's possession is precarious to this extent: He holds possession with the implied-in-law knowledge that he has acquired the right to possession, subject to the vendor's paramount right to seize the property without hearing should he default in his payments. This seizure, the law ordains, must be with security in favor of the debtor and can only continue until a final adjudication of the rights of the parties. In effect, when the purchaser acquires movables he consents to the privilege and its enforcement provisionally.

The vendor's privilege differs from the common law conditional sale in that in the conditional sale, the vendor retains title, and he does not lose his right to recover the property after it leaves the possession of

the vendee. It is different with the vendor's privilege. The vendor's privilege is lost when the vendee divests himself of possession. The prejudgment seizure is the only effective device which will preserve the vendor's rights against a reluctant debtor, pending the protracted delay incident to obtaining judgment. Sequestration is simply a device to which the parties to the sale have, in effect, agreed whereby the property may be preserved for the mutual benefit of the parties pending a determination of their rights.

The law of vendor's privilege in this state operates to favor the vendor and vendee alike. The long history of vendor's privilege in Louisiana demonstrates that it enables the purchaser to acquire property he may otherwise be unable to buy as much as it induces the vendor to sell. Without the benefits accorded the vendor, it may well be concluded that in a substantial number of instances the possession and title to property would not be surrendered to prospective purchasers. Because of it, many impecunious citizens are enabled to acquire property to foster for their livelihood and provide for their sustenance.

We can discern no violation of due process rights when the purchaser is fully informed by law of the remedies which may be invoked as an incident of the sale.

II.

Finally, Mitchell complains that he has not been permitted to proceed in forma pauperis. He maintains he is indigent and entitled to the privilege of litigating without the prior payment of costs (La. Code Civ. P. art. 5181), because, according to his brief, he earns only $70 per week. He maintains this low income, coupled with the need to support a wife and three children, creates such a hardship that he cannot afford to pay the costs.

There is no record evidence to support the claim other than the general statements in his affidavits accompanying the motion to dissolve to the effect that he is unable to pay costs because of his poverty. This is not sufficient to overcome the presumption of correctness attaching to the judge's order which denied Mitchell the right to proceed in forma pauperis. Nevertheless, since we are

remanding this case to be proceeded with on its merits, we shall afford Mitchell an opportunity to make up a proper record on this forma pauperis.

For the reasons assigned, the ruling of the trial judge rejecting the motion to dissolve the writ of sequestration is affirmed, and the case is remanded to the trial court for further proceedings in accordance with law and the views herein expressed. The assessment of costs is to await the final outcome of the case.

REHEARING REFUSED Dec. 11, 1972

SUPREME COURT OF LOUISIANA

No. 52,388

W. T. GRANT COMPANY

versus

LAWRENCE MITCHELL

On Writ of Review to the Court of Appeals, Fourth Circuit, Parish of Orleans

TATE, Justice (concurring in part and dissenting in part).

I fully concur in Parts II and III of the excellent majority opinion. However, on the basis of current legislative enactments and judicial interpretations, I cannot subscribe to the holding that a debtor's cooking stove and refrigerator are not expressly exempt from seizure under La.R. S. 13:3881.[1]

This enactment is found within Title 13 ("Courts and Judicial Procedures") of the Louisiana Revised Statutes. It is found in Chapter 18 thereof, entitled "Seizures in General", La.R.S. 13:3881 exempts specified income or property "from seizures under any writ, mandate, or process *whatsoever*."

There is thus no statutory warrant for holding La. R.S. 13:3881, providing for exemptions from seizure under "*any* writ, mandate, or process *whatsoever*", applicable only to seizures under writs of fi.fa. Nor is there any practical reason for the distinction.[2]

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[1] The stereo simultaneously seized is not exempt from seizure under the statute; the washing machine may be, if it is within the exemption of "washtubs". See footnote 3 below.

[2] Here the seizure was under a writ of sequestration, a conservatory writ permitting provisional seizure of the property "during the pendency of the action", La.C.Civ.P.Art. 3571, i.e., before judgment. The property thus temporarily seized cannot be sold until there is final judgment, recognizing the sequestration. La. C.Civ.P.Art. 3510,

The exemption statute in question was enacted in 1960 in connection with the repeal of the old 1961 Code of Practice, especially Article 644 thereof. As did that former Article, the 1960 statutory provision exempts from seizure a major proportion of a debtor's wages, the tools and instruments by which he earns a living, and (pertinently) certain minimal household goods necessary to save a debtor from being without the means to eat or sleep.[3] This statute unambiguously exempts from any seizure the present debtor's stove and refrigerator.

The writer initially believed that, despite this exemption from seizure, it did not apply to debts "for the purchase price of property or any part of such purchase price", by reason of Article 11, Section (4), La. Constitution of 1921. See Footnote 4 below. However, this court expressly rejected a similar contention in Young v. Jeter, 185 La. 709, 170 So. 240, 107 ALR 608 (1936), a lead case. See also Grayson v. Gray, 207 So.2d 916 (La.App.2d Cir. 1968) to the same effect; cf. also, Mounger v. Ferrell, 11 So.2d 56 (La.App.2d Cir. 1942).

In *Young* v. *Jeter* a landlord sought to enforce his lessor's privilege against certain property used by the tenant to earn his livelihood. Just as is the property

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after which the property must be seized and sold under the writ of fi.fa See Hancock Bank v. Alexander, 256 La. 643, 237 So.2d 669, 673 (1970) and Official Revision Comment (b) to Article 3510. Thus, under the majority's interpretation, a debtor cannot claim the exemption from temporary seizure but, under La.R.S. 13:3881, he may do so to prevent the sale of the exempted property when a writ of fi.fa. issues in execution of the judgment. Aside from harassing the debtor by depriving him of the *temporary* use of his beds, bedding, kitchen stove, etc., the creditor thus is not permitted to seize and sell the property to satisfy the claim against it.

[3] See La.R.S. 13:3881, exempting from seizure by "any writ, mandate, or process whatsoever: * * * 4. The clothing, bed, bedding, bedstead, linen, china, glasses, knives, forks, spoons, dining table and chairs, cooking stove, kitchen utinsels, pressing irons, washtubs, and refrigerator (electric or otherwise) used by him or a member of his family; the family portraits; his arms and military accoutrements; the musical instruments played or practiced on by him or a member of his family; and the poultry and fowl kept by him for the use of his family."

presently seized, the tools there seized were exempt from seizure under the predecessor provision (Article 644, Louisiana Code of Practice of 1870) to La. R.S. 13:3881 (2). This court expressly rejected the contention that provisions of Article XIX, Section 2 [4] applied so as to nullify the statutory exemption from seizure of property subject to the landlord's privilege. The court expressly held that the cited constitutional provision applied only to invalidate the claim of a right to the homestead exemption established by Article 11, Section 1, of the constitution—an exemption concededly not at issue here.

In refusing to hold the statutory exemption invalid against the claim of the lessor's privilege (a claim based like the vendor's privilege upon our Civil Code and the valid commercial and equitable purposes thereby embodied), this court expressly stated, 170 So. 242: "In order to advance the humane purpose of preserving to the unfortunate debtor and his family the means of obtaining a livelihood and thus prevent him from becoming a charge on the public, it has become an almost universal rule that statutes creating an exemption should receive a liberal construction in favor of the debtor."

The ruling in *Young* v. *Jeter* is controlling here. The broad statutory exemption to a debtor of minimal household furniture necessary for him to eat and sleep must be respected by the courts. As there stated, 170 So. 241, "the state has an interest . . . that families shall not be deprived by extravagance or misfortune of shelter and comforts necessary to health and activity."

There is simply no legislative or constitutional exception from this exemption now in effect. However, salutary the purposes of the legislatively created vendor's privilege, "it is hornbook law" that the legislatively created privilege may be legislatively made subject to "such exemptions and limitations" as the legislature sees fit. Young v. Jeter at 170 So. 242.

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[4] The constitutional article provides that "this exemption" does not apply to debts "1. For the purchase price of property or any part of such purchase price. . . . 5. For rent which bears a privilege upon said property.

Arguably, perhaps, former Code of Practice Article 845 (1870; as amended in 1924) did provide a statutory basis for a claim that the statutory exemption from seizure did not apply to debts for the purchase price. See Ferrell v. Jena Auto. Co., 16 So.2d 548 (La.App.2d Cir. 1943). However, Article 845 of the Code of Practice was repealed by the enactment of the 1960 Code of Civil Procedure. No subsequent enactment was afforded even the shadow of a basis for claiming that the statutory exemption from seizure of minimal household goods must not be respected by the courts.

The courts are not empowered to supply an exception to the broad exemption provided by the legislature in La.R.S. 13:3881, however equitable or wise we may deem such an exception. Perhaps the legislature in its discretion and wisdom may modify such exemption law, in the same manner as former La. Code of Practice Article 845 was modified (to except certain debts, such as the purchase price, from the exemption from any seizure); but it has not yet done so. Until then, the creditor's only remedy is to secure a contractual waiver of the exemption by chattel mortgage or otherwise.

For these reasons, I must respectfully dissent.

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

For Immediate News Release

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 11th day of December, 1972, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

* * * *

52,388 W. T. Grant Co. v. Mitchell

NOT CONSIDERED. Not timely filed.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 72-6160

LAWRENCE MITCHELL, PETITIONER

v.

W. T. GRANT COMPANY

On Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for a writ of certiorari be, and the same is hereby, granted.

May 14, 1973

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